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OCT 11 1944
CLERK

IN THE
Supreme Court of the United States

October Term, 1944

No. 488

THE BARNES FOUNDATION,
Petitioner

vs.

BERTRAND RUSSELL,
Respondent

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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Land Title Building,
Philadelphia 10, Pa.,
Attorney for Respondent.

WHITE & WILLIAMS,
Of Counsel.



INDEX

	Page
Counter-Statement of the Case	1
Argument	5
1. Interpretation of Rule 56	5
2. Interpretation of Rule 43	5

CITATIONS

Cases Cited:

American Crystal Sugar Co. v. Nicholas, 124 F. (2d) 477.	6
Cooper v. Brown, 126 F. (2d) 874	6
Long v. Morris, 128 F. (2d) 653	6
Maguire v. Gerstley, 204 U.S. 489	6
Seitz v. Brewers' Refrigerating Co., 141 U.S. 510	6
Sibbach v. Wilson Co., 312 U.S. 1	6

Miscellaneous:

Federal Rules of Civil Procedure:

Rule 43	5
Rule 56	5
Restatement Conflict of Laws §597-599	6
3 Beale, Conflict of Laws, §599.1	6

COUNTER-STATEMENT OF THE CASE

This suit was an action for breach of contract by Bertrand Russell, respondent, against The Barnes Foundation, a corporation, petitioner. The contract of employment on which the suit is based reads as follows:

"THE BARNES FOUNDATION

Merion

Montgomery County

Pennsylvania

August 16, 1940

Mr. Bertrand Russell,
Fallen Leaf Post Office,
Lake Tahoe, California

Dear Mr. Russell:

We confirm herewith the verbal agreement made with you on August 8, 1940:—

We agree to engage you as a member of the teaching staff of the Barnes Foundation at a salary of eight thousand (\$8,000) dollars per year, payable in twelve (12) equal monthly installments, on the fifteenth day of each month.

The agreement is to extend for a period of five (5) years, dating from January 1, 1941. If, during the period of the aforesaid agreement, your personal affairs should make it necessary or advisable to terminate the contract, we agree that such a termination may be effected at the end of our school year: namely May 31st.

Your service to the Foundation will consist of one lecture each week during the school year which extends from October 1st to May 31st inclusive, each lecture to be delivered in the gallery of the Barnes Foundation, at Merion, Pennsylvania.

Yours very truly,

THE BARNES FOUNDATION

Paul Hogan

Witness Albert C. Barnes
President

(CORP. SEAL)

Sarah M. Cleaver Witness N. E. Mullen
Secretary-Treasurer

I, Bertrand Russell, hereby agree to the terms and conditions of the above agreement entered into between myself and the Barnes Foundation.

Mary Mullen
Cynthia F. Stine Witnesses (2) Bertrand Russell"

The contract which appears in the petition at pp. 2-3 is not the contract on which the suit is based. Respondent duly entered upon the performance of his duties and gave the lectures as agreed for two years. Shortly before the end of the second year, petitioner notified him that his contract would be terminated as of the end of that year, but offered to continue his engagement to perform the same services at a reduced salary of \$6000 a year (7a). No reason was given for the action taken. Respondent has received no salary since December 31, 1942.

This suit was begun by the filing of a complaint on January 18, 1943, to recover respondent's loss by reason of petitioner's breach of the contract. Petitioner filed an answer alleging that the parties had agreed to certain oral terms of the contract which were inconsistent with and not included in the written instrument and that these oral agreements had been broken by respondent, thus excusing petitioner for terminating the contract.

The oral terms which it was alleged the parties had agreed to were (1) that respondent would not deliver popular lectures after a certain date, and (2) that he would conform to a certain undefined "standard of personal and professional conduct", which it was alleged was agreed upon prior to the signing of the written contract.

Respondent moved for summary judgment in his favor pursuant to Rule 56 of the Rules of Civil Procedure, which provides in paragraph (c) :

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Respondent supported his motion by an affidavit which, without admitting the materiality of the averments in the answer, which attempted to set up oral terms not incorporated in the written contract, showed that there was no genuine issue of fact even as to said immaterial averments. Petitioner filed a counter-affidavit which added nothing to the case except to give more details as to the alleged violation of the alleged oral terms.

After argument, the court entered summary judgment in favor of respondent, but did not assess the damages, directing that the case proceed to trial for the determination of the amount of such damages (see opinion of the court, 32a, 50 Fed. Supp. 174).

An appeal was then taken to the Circuit Court of Appeals which was dismissed because there was no final judgment in the court below (136 Fed. (2d) 654). The case proceeded to trial to determine the amount of damages and on November 16, 1943, the court filed its opinion and findings that "plaintiff has suffered a loss of \$20,000 as a result of the defendant's breach of contract of employment" (179a, 52 Fed. Supp. 827). Judgment was entered accordingly. Upon appeal to the Circuit Court of Appeals, the judgment was affirmed (192a, 143 F. (2d) 871).

The description of The Barnes Foundation on page 2 of the petition is contained in a pamphlet which the court excluded from evidence (151a). There is no basis in the record for the alleged quotation from John Dewey on the same page: the statement that Mr. Russell was employed "at the height of the then current controversy between Bertrand Russell and the College of the City of New York" has no support in the record; the statement on page 4 of the petition that defendant terminated Mr. Russell's engagement for cause is unsupported by any evidence; the statement on the same page that "without any opportunity to the Foundation to present its evidence, summary judgment under Rule

56 was granted in favor of Mr. Russell on his bare statement that he had performed his duties" is far from accurate. The action of the courts below was based on the fact that petitioner had alleged nothing in its answer which could serve as a defense to the action brought by the respondent.

ARGUMENT

The basis of the petition appears to be that the court below erroneously interpreted Rule 56 of the Federal Rules of Civil Procedure in conflict with interpretations by other circuits, and interpreted Rule 43 in conflict with decisions of this court and circuit courts other than the court below. Neither of these contentions, we respectfully submit, has any basis in fact or law.

1. Interpretation of Rule 56

The argument of the petitioner (Petition, p. 8) is based on the alleged error of the District Court in refusing certain offers of proof. These offers, as shown by the one alleged to be typical (Petition, p. 8), were made at the trial for the sole purpose of determining the amount of damages, which trial took place after judgment had been entered for respondent. It is obvious, without discussion, that the offer quoted on page 8 of the petition, and others of similar nature, had no relevancy to the issue then being tried. The contradictions in the affidavits quoted on pages 9 and 10 of the petition relate entirely to the alleged oral agreement of which no evidence could have been admitted. The issues so raised were therefore immaterial and the motion for summary judgment was properly granted.

The cases cited by the petitioner on page 11 of its petition as being inconsistent with the interpretation of the court below have no relevancy.

2. Interpretation of Rule 43

Petitioner argues that the court's interpretation of Rule 43 is in conflict with the decisions of this court and Circuit Courts other than the court below. Its argument apparently is that the court below is in error in applying the Pennsylvania rule that oral testimony cannot be introduced to alter or add to the terms of a written contract, except in cases of fraud, accident or mistake not alleged here.

It is submitted that petitioner is in error in contending that the Pennsylvania rule is not applicable in a case of this character. See *Restatement Conflict of Laws* §597-599. That the rules of civil procedure do not affect the principle that the admissibility of evidence under circumstances such as the present is to be determined by state law is clear. The question of the admissibility of oral evidence to vary or contradict the terms of a written instrument is a question of substantive law and not merely procedure: *Long v. Morris*, 128 F. (2d) 653; *Cooper v. Brown*, 126 F. (2d) 874; *American Crystal Sugar Company v. Nicholas*, 124 F. (2d) 477; 3 *Beale, Conflict of Laws* § 599.1. There is nothing in *Sibbach v. Wilson Co.*, 312 U.S. 1, which is inconsistent with this view, the court in that case having distinctly decided that the rules of civil procedure relate only to practice and procedure, quoting the Act of Congress that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant". There is no conflict of decision on this point. The cases cited by petitioner have no relevancy.

But this point is really immaterial, for the rule is the same in Pennsylvania and in the United States courts that oral evidence to contradict, modify or add to a written contract is not admissible unless it is alleged that the missing terms were omitted from the writing through fraud, accident or mistake: *Seitz v. Brewers' Refrigerating Company*, 141 U.S. 510; *Maguire v. Gerstley*, 204 U.S. 489. Petitioner does not argue that the evidence would be admissible under the Pennsylvania rule. As the rule of the Federal courts is the same it is immaterial which rule is applied. The cases cited by petitioner on pages 13 and 14 of its petition are cases in which oral evidence was admitted to explain but not in any particular to contradict written contracts.

It is respectfully submitted that the petition should be denied.

T. R. WHITE,

Attorney for Respondent.

WHITE & WILLIAMS,
Of Counsel.

